**Laborers' International Union of North America, AFL–CIO, Local Union No. 89 (Wagner Construction Co.) *and* Alan Perales Vara.** Case 21–CB–10419

January 11, 1991

## DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND RAUDABAUGH

On October 11, 1989, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

*Brian J. Sweeney, Esq.*, for the General Counsel.
*Ray Van Der Nat, Esq.*, of Los Angeles, California, for Respondent Laborers Local 89.

## DECISION

### STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard this case in trial at San Diego, California, on May 17 and 18, 1989. It first came to the Board's attention when Alan Perales Vara (Perales)[1] filed an unfair labor practice charge against Respondent Laborers Local 89 (the Union) on December 14, 1988, the same day the Union had taken the action which triggered his charge. After investigating, the Regional Director for Region 21 issued a complaint and notice of hearing against the Union on January 31, 1989.

That complaint alleges, in substance, that on December 14, 1988, the Union violated Section 8(b)(2) and (1)(A) of the Act by ''request[ing]'' that Wagner Construction Co. (Wagner) ''immediately remove'' Perales from its Del Mar, California jobsite, and that Wagner did, in fact, ''remove'' Perales on that same date, all under circumstances where the Union had previously ''failed to give reasonable notice to Perales of certain alleged dues and fees delinquencies . . .; failed to inform Perales of the amount owed and the method used to compute that amount; failed to afford Perales an adequate opportunity to make payment of the alleged delinquencies; and failed to warn Perales that he would be discharged if he failed to pay the alleged delinquencies.''

At trial, I allowed the General Counsel to make certain amendments to the complaint which, as clarified by the General Counsel's statements of position at trial and his further refinements on brief, amount to alternative theories of prosecution. In substance, one theory is that the Union treated Perales differently from other workers in Perales' shoes because Perales was a member of a rival political faction within the Union. At bottom, this theory proposes as a matter of fact that but for Perales' protected exercise of his right to engage in rival internal union activities, the Union would never have proceeded against him as it did. The other theory proposes as a matter of law that Perales was a ''new'' employee when, less than 7 full days after he started working for Wagner, the Union allegedly demanded his ''immediate removal'' from the job; under this theory, the Union was legally required to wait at least until Perales had completed the Section 8(f)-mandated 7 days of work before it could lawfully demand that he fulfill whatever union security obligations might apply to such an employee (apparently, to become a ''new'' member and pay associated initiation fees and dues).

Respondent denies all alleged wrongdoing, averring as affirmative defenses that its conduct was ''protected under Sections 8(b)(2) and 8(a)(3) of the Act,'' that its conduct was ''not discriminatory [sic] applied to the Charging Party and has consistently and legally been enforced,'' and that ''Respondent's notice requirement was 'excused.'''

Based on the record, my study of the parties' posttrial briefs, my assessments of the witnesses as they testified, and my appraisals of the inherent probabilities, I make these

### FINDINGS OF FACT

#### I. INTRODUCTORY OVERVIEW

On December 14, 1988, the Union's business agent, Louis Phillips, confronted Perales (who had stopped paying dues 13 months earlier) over his working on a Wagner jobsite while ''on suspension'' by the Union for dues delinquency. Phillips also complained to Wagner's agents, including Superintending Foremam Stephen Butler about Perales' presence on the site. Butler then spoke with Perales about Phillips' call, whereupon Perales left the site before quitting time and went to the Board's office to file a charge against the Union. About 2 weeks later, on the advice of a Board agent, Perales approached the Union to try to settle his arrearage and get a clearance to get back to work. In the course of these discussions, Perales claimed that he was entitled to a credit because he had overpaid dues between 1985 and 1987, during a period when he was actually disabled, and that he had previously submitted documentation to the Union supporting his right to pay a reduced, ''disability dues'' amount, but had never received any acknowledgment by the Union of these submissions, and that this had caused him in November 1987 to stop paying any dues. The Union investigated, and later

[1] The complaint uses the surname ''Vara,'' but, at trial, the Charging Party was as often referred to as ''Perales,'' which is the surname adopted by the General Counsel on brief.

denied, Perales' counterclaims.[2] Perales eventually paid the back dues the Union said he owed, was reinstated to full membership, and received the Union's clearance to go back to work for Wagner, which he did, on or about January 7, 1989.

Much of the litigation was devoted to an exposition of background matters. These cannot be ignored if one hopes to reach a fair understanding of the events central to the complaint, and I thus address them first in some detail.

## II. BACKGROUND

### A. *The Master Labor Agreement and Relevant Practices Under It*

Wagner is a construction contractor in Southern California whose direct or indirect impact on interstate commerce is enough to meet the Board's discretionary standards for taking jurisdiction. The Union and Wagner are parties to a master labor agreement which governs the hiring and referral of laborers and which was applicable to Wagner's operations at all times in question. Section 12 of the agreement contains a familiar construction industry union-security clause; that section further provides, however, that an employer ''shall not be required to discharge any employee pursuant to this Section until a written notice from the Union of such employee's noncompliance with this Section . . . shall have been served upon such . . . Employer.''

Customs and practices under the agreement—particularly those associated with the hiring of laborers and the Union's enforcement of the union-security clause—are not strictly congruent with the literal provisions in the agreement. The undisputed testimony allows these generalized findings: Although the agreement contemplates that employers will first make contact with the Union as the exclusive referral source, and that jobseekers will obtain a referral slip from the Union before starting work, the Union's agents concede it is common for members to locate their own jobs, begin working, and only later to make arrangements to get a post facto referral, or ''clearance,'' from the Union.

Most members get a clearance, either before or shortly after starting work; the Union's copy of this record serves as a cross-reference for the pension and benefit trusts in making sure that each covered employee receives proper employer contributions for working under the agreement. But the Union's agents also concede that, in practice, the Union is likely to make an issue of an already-employed laborer's failure to get a clearance only if the laborer is dues-delinquent.[3] And even in those cases the Union will not normally seek the laborers' immediate removal from the job by invoking the union-security clause; rather, upon discovering a delinquent member working, the Union's business agent will normally instruct him or her to stop by the Union's offices after work to clear up the delinquency. Also typically, the employee and/or the employer will be warned that the Union will seek the employee's removal if the delinquency is not straightened out and the employee fails to be properly cleared by the Union for continued employment.

When a delinquent employee complies, the Union in due course issues a clearance ratifying the employee's presence on the job. If informal exhortations do not get the matter cleared up, the Union will eventually send the employer a written ''Violation Notice—Removal Slip'' which contains as standard language the statement, ''The following named person was found to be employed . . . in violation of the above indicated collective bargaining provisions, and you are hereby notified to remove this person from your job immediately.''

### B. *Internal Union Politics*

In 1981 Perales defeated Paul Aleman in an election for the position of business manager, the chief executive office in the Union, and he thereafter served a 3-year term. After taking office Perales brought internal union charges against Business Agent Louis Phillips, and others associated with the former Aleman slate, in which Perales alleged that Phillips, et al., was intentionally impeding Perales in his performance of official duties. The International sustained these charges and barred Phillips from holding elected positions in the Union for 3 years. In union elections in 1984 a slate headed by Aleman defeated Perales and his slate, and dismissed those rivals from paid positions in the Union shortly after that. Phillips was then reappointed business agent. Three years later Perales made another bid for election to the business manager post, but was again defeated by Aleman in an election held in June 1987.

The record contains no evidence that Perales has played any role in internal union affairs since that date; indeed, when Perales stopped paying dues in November 1987, it appears that he dropped from sight until reemerging on Wagner's job in December 1988.

### C. *Perales' Prior Employment By Wagner; His Disability History; His Reemployment by Wagner in December 1988; His Actions Before Ceasing Dues Payments; His Suspension from Membership*

Perales first worked for Wagner, with the Union's post facto clearance, in April 1987. After about 2 weeks, however, he requested and received from Wagner's superintending foreman, Stephen Butler, a ''layoff,'' assertedly due to the recurrence of a physical ailment which had left Perales disabled for much of the preceding 2 years.[4] When Perales again felt fit, he made contact with Butler and returned to work for Wagner on or about December 7, 1988, this time without notifying the Union or obtaining a clearance.

In the meantime, starting in November 1987, Perales had intentionally stopped paying dues. Perales' current explanation for this rests on a series of claims: One is that he be-

[2] In denying Perales' counterclaims, the Union found no evidence that Perales had ever previously claimed entitlement to ''disability dues'' status, and then invoked a regularly adopted rule of some years' standing which bars retroactive credit for dues overpayments more than 6 months before a member makes such a claim. The complaint does not attack the Union's disposition of Perales' counterclaims and the General Counsel has not otherwise called it into question.

[3] So far as this record shows, the practices here described are applied equally to members who are merely ''delinquent'' and to members who have been ''suspended'' for dues nonpayment; see, e.g., direct examination of Stephen Butler.

[4] For all purposes below I assume, without deciding, that Perales' testimony concerning his disability is true, including when it first occurred (1985), when it abated (April 1987), when it recurred (later April 1987), and when it reabated (December 1988). I note also that Perales admittedly sought to conceal the fact of his disability history in completing application forms for Wagner, explaining at trial that he feared it would impair his future work chances to disclose that history.

lieved he was due a ''credit'' for having paid ''regular'' dues for the 2 years preceding November 1987, when he had been disabled, and thus should have been entitled to maintain his membership by paying a reduced ''disability'' dues amount of roughly $10 per month, rather than the roughly $17–$18 per month he had actually paid between 1985–1987 as ''regular'' dues. Relatedly, Perales claims that he had twice submitted documentation to the Union requesting to be allowed to pay ''disability dues'' (first, in November 1985, to a clerical in the Union's ''finance office,'' and second, in April or May 1987, to a neutral ''judge'' in connection with his submission of papers to become a candidate in the union election scheduled for June). In the latter case Perales explains further that, although he had never before met this election official (known to Perales only as ''Lee''), and although Lee was not an officer or agent of the Union, Perales nevertheless trusted him as a ''neutral'' figure and therefore urged him to use his good offices to transmit Perales' ''disability dues'' request and associated paperwork to the Union's secretary-treasurer for action. And, says Perales, it was the Union's failure at any time to acknowledge that he had sought ''disability dues'' status which caused him finally to become fed up and to stop paying any dues whatsoever, hoping, he says, to ''force the issue'' by discontinuing dues payments entirely.

Agents of the Union uniformly deny being aware of Perales' claimed submission of ''disability dues'' documentation or of his ever having claimed an entitlement to pay a reduced dues amount; they say they first became aware of such claims only in January 1989, after Perales filed his charge with the Board, and, as summarized above, Perales raised this claim before eventually paying back-owed dues and receiving the Union's clearance to return to work at Wagner. It was only then, say the Union's agents, that one or more of them searched the Union's files, finding no record whatsoever of any claimed submission to the ''finance office'' in 1985, but discovering indeed (in a ''sealed envelope'' containing records maintained by the election judge and subsequently put in storage) copies of the documentation which Perales said he gave to that judge prior to the June 1987 election.

Perales admits that at no time following his claimed submission of ''disability dues'' documentation to a clerical employee in the Union's ''finance office'' in November 1985 did he ever again directly communicate with any official of the Union regarding the Union's failure to acknowledge that claimed submission (nor regarding the Union's failure to acknowledge receipt of the similar or identical papers he gave in the spring of 1987 to the election judge). He admits moreover, that either he or his wife appeared personally at the Union's office every month between November 1985 and November 1987 to make a monthly ''regular'' dues payment, and did so without ever once challenging the dues amount or making any reference to the claimed prior submission of ''disability dues'' paperwork.

In the next section I will discuss my belief that Perales was untruthful about key events on December 14. Wholly apart from those considerations, however, Perales' admissions about his acquiescence in paying ''regular'' dues for 2 years makes it difficult to believe that he ever made the original submission in 1985 to the ''finance office'' which he now claims he made. To the extent the General Counsel's case or any part if it requires me to find that Perales made the alleged 1985 submission, I find it at least as likely as not that Perales never did so, and, therefore, that this element has not been established by a preponderance of the credible evidence in the record as a whole. Similarly, given the state of the record about Perales' later submission of documents to the election judge, I find it at least as likely as not that those documents were placed only in the sealed election file, were never brought to the attention of the Union's officials by the election judge and, in fact, that no one in the Union's directorate was ever aware, before January 1989, of the latter submission, nor of any prior wish on Perales' part to be allowed to pay ''disability dues.''[5]

Although the Union had never previously notified Perales of this fact, the Union had marked Perales down on its records as ''suspended'' since the point in November 1987 when Perales had ceased paying dues. (This was Perales' second such suspension; in the early 1970s Perales had also been suspended from membership for nonpayment of dues, but was eventually reinstated upon payment of the back-owed amount.) I will presume that Perales, as a longstanding member, and a former executive of the Union, knew that the Union will eventually suspend a member who stops paying dues. And, given that Perales was not then working (and did not resume working for another 13 months), and given the absence of any showing that the Union generally follows different suspension procedures than the one employed in Perales' case, it does not appear significant to the merits that Perales received no contemporary notice of this internal ministerial action.[6]

### III. ALLEGED UNFAIR LABOR PRACTICES; THE EVENTS OF DECEMBER 14

It was against this background that Business Agent Phillips came to Wagner's Del Mar jobsite in the early afternoon

[5] It is a fair challenge to these findings to question how it could be that Perales would not have sought ''disability dues'' status as early as 1985, as he claims, when I have found that he did, in fact, at least provide documentation concerning his disability to the election judge in 1987. I think the record provides a counterexplanation which is at least as plausible as the version Perales would have me accept: Given Perales' admitted concern about how disclosure of his disability might impair his chances for work, he could have decided in 1985 that continuing to pay ''regular'' dues was preferable to having his disability a matter of record in the union office which served also as the exclusive hiring hall for the industry. With an election candidacy in mind by 1987, however, and with the fact that he had scarcely worked in the trade in the previous 2 years, he could have judged his absence from the workplace a political liability, and only then have decided to make his prior disability status a matter of record before the election judge. And, under this alternative scenario, Perales would not have been submitting his documentation for the purpose of its being ''passed on'' to the Union's officials as a request for ''disability dues'' status, but rather merely for the purpose of there being a ''record'' of his disability in the election files, should anyone make an issue about where he had been in the past 2 years. I remain unpersuaded by Perales' word alone that, in submitting documents to the election judge, he intended these to be passed on for action. And even if Perales did intend for the judge to pass along such a message it should have become increasingly clear to Perales, as nearly 6 more months passed while Perales continued without complaint to pay ''regular'' dues, that the message had not been delivered.

[6] On this record as previously summarized it appears that, in practice, the Union seeks to collect delinquent dues only if it discovers a delinquent member on the job, and then relies on the threat of job removal, rather than dunning letters, or lawsuits, to enforce its members' dues obligations. This practice is not separately challenged by the complaint except insofar as it relates to the General Counsel's showing that the Union did not fulfill certain ''notice'' obligations to Perales before allegedly demanding and obtaining from Wagner Perales' ''immediate removal'' on December 14.

of December 14,[7] and that the three events of central importance to the case quickly unrolled, as Phillips first confronted Perales for working during his current suspension, then telephoned Wagner's office, eventually speaking with Butler, to protest Perales' presence on the job, and Butler then went to the site and spoke with Perales, whereupon Perales left the site to file his charge at the Board's offices, which was docketed and timestamped at 2:43 p.m.

Perales' version of those events in which he was directly involved is in many ways harmonious with those given by Phillips and Butler, respectively; in the end the only significant variances are between Perales and Phillips about their original confrontation. Focusing first on that encounter, those participants agree that Phillips told Perales that Perales had been suspended by the Union, that he should not be working without a clearance, and that Phillips intended to contact Wagner's agents to complain that they were using a ''suspended'' man on the job who hadn't been properly ''cleared.'' (Perales claims—and Phillips denies—that Phillips expressly threatened to ''remove'' Perales; I find from the totality of Phillips' admitted actions that he communicated at least the threat of future removal action if Perales were to fail to make a satisfactory arrangement regarding his delinquency and to get properly cleared). They agree that Perales protested (they disagree about the clarity of his protest) that the Union had made a ''mistake'' when it had suspended Perales because he was then entitled to a credit for previous overpayments when he was disabled for 2 years. They also agree that Perales threatened in some form to take the dispute to the ''NLRB.'' Finally, they agree that when their conversation concluded, Phillips left the site while Perales remained at work.

The only material disagreement between their versions is whether (as Perales, joined by the General Counsel, claims in substance) Phillips' threat to ''remove'' Perales was to be implemented immediately, or (as Phillips claims in substance) would occur only if Perales failed to go to the Union's offices to get his suspension/delinquency ''squared away'' and to get properly ''cleared.'' For reasons more fully explained in concluding findings, I find Perales' account far less believable than Phillips' on this point.

As to the next set of events (Phillips' telephone call to Wagner, his conversation with Butler, and Butler's conversation with Perales on the site) the accounts of those three participants are even more harmonious. Phillips admittedly telephoned Wagner's office, speaking first with a company agent named ''Holmberg'' (''Himeberg'' in the transcript).[8] He admittedly told Holmberg that Perales was working on the site while on ''suspension,'' and had not been properly ''cleared,'' but that he ''didn't want to cause a problem to either the company or the man[,] that I would like to see him just get properly cleared.'' When Holmberg, in turn, referred Phillips to Butler, those latter participants roughly agree on the following: Phillips chided Butler, a member of the Union and a former functionary within it, that he should know better than to be working a member who was suspended. Butler claimed he was unaware of Perales' suspension, but tried to explain away the problem by suggesting that Perales had simply not had time yet, due to a heavy ''overtime'' schedule, to get into the Union's offices to straighten out any dues arrearage and get cleared to the site. As Butler credibly recalled it, Phillips also, ''told me that . . . if Perales came back to work without a clearance . . . he would write the Company a violation.'' Butler agreed to talk to Perales and to get the matter taken care of.

Phillips repeatedly insisted at trial that he never intended or demanded that Wagner discharge Perales immediately, as distinguished from urging Perales' and Wagner's agents to get Perales' suspension cleared up before continuing on the job. And Butler admittedly did not understand Phillips to be demanding that Wagner immediately discharge Perales; rather, it is implicit in his quoted account above, and was made explicit in his later remarks to Perales, summarized next, that Butler understood that Phillips was prepared to initiate the ''removal'' process by ''writing a violation against the company'' only if Perales were to arrive at work the *next* day without having first gone to the union hall to get his delinquency/suspension straightened out and obtain a clearance slip from the Union to return to work. Thus, Perales and Butler agree that Butler found Perales at the site, told him about his call from Phillips, informed him that Butler ''could not work [Perales] without a clearance,'' and *further advised him to go to the Union to obtain such a clearance*. Perales admits, ''if I recall correctly, Mr. Butler told me that I needed to get things squared away with the Union and I said that I would.'' Indeed, according to Butler (who was not contradicted on the point by Perales) Butler ''let him leave early,'' in the sense of ''allow[ing]'' him to leave the site. Butler's version thus strongly implies that Perales was not dismissed from the site, but rather sought Butler's permission to leave.

It was particularly while narrating his version of the events of December 14 that Perales seemed the most false, leaving the impression that he was embellishing his account with litigation considerations foremost in mind. This was best exemplified during direct examination as Perales sought to portray himself as maintaining an attitude of sweet reasonableness in the face of Phillips' supposedly brusque and adamant refusal to consider the possibility that the Union had made a ''mistake,'' or to withhold action until Perales himself could try to clear up the ''mistake'' with the Union. Thus,

> I said . . . Lou, I could go to the [Union] office this afternoon if you want . . . and we can get this straightened out. He said no, that as a matter of fact he was going to call the contractor and he was going to tell them that I wasn't supposed to be on the job site. I said

[7] Phillips explains he came to the site based on a call from a member that an unnamed person was working on the Wagner site while ''on suspension''; he says that as soon as he saw Perales, he assumed Perales was the subject of the tip, since he knew that Perales had not been paying dues for more than a year. While I retain some doubts about Phillips' accounting for his visit to the site, this does not affect my judgment of the ultimate merits. As I discuss in the next section, the Union undeniably had a right to enforce its union-security clause, and prima facie grounds for believing that Perales was dues-delinquent, and it therefore does not matter that Phillips may have approached the confrontation knowing that Perales was the target, or even that Phillips' may have experienced a certain relish over the prospect of confronting a former rival.

[8] There is no dispute that one of Wagner's agents is named ''Holmberg.'' Holmberg was not called to testify. I credit Phillips' account of his remarks to Holmberg despite Phillips' tendency to shape his account to avoid using what he apparently believed were legally damaging words, such as ''remove.'' Again, I find it implicit even in Phillips' accounts that the Union would seek to have Perales ''removed'' from the job if he did not clear up his delinquency and obtain a proper clearance to the job.

> gee, Lou, give me the benefit of the doubt. Again, I pleaded with him to let me go to the Local office and we would get this thing squared away. He said no, that he was here to do [his] job and that I was a Non-Union man on the site and I'm going to have to remove you.

Phillips, by contrast, states he merely told Perales that he ''didn't know anything'' about a claimed ''credit'' for an earlier ''disability''—related dues overpayment (''that was not my department . . . I don't work finances, I cover the agreement'') and, significantly, Phillips recalls that it was he—not Perales—who ''suggested that [Perales] go ahead and work the day out and come in [to the Union] office that afternoon and if there was a problem, to get it corrected.''

Perales' description of his attitude of pleading reasonableness does not fit well with his own admissions during cross-examination about his state of mind after speaking with Phillips (''I was mad, sir. I was completely out of my mind''). Perales' attempt to depict himself as having been run off the job by the Union's supposed demands for his immediate removal cannot be squared with his own admission that he had been advised by Butler to go to the Union and get the dispute cleared up and that he had agreed to do so. For the same reason, I doubt that Perales, in fact, believed at the time that he was being dismissed from employment, rather than being given an opportunity to settle the dues arrearage dispute and obtain a clearance to return to the job. And Butler's testimony suggesting that Perales asked permission to leave early, which I specifically credit, makes it very hard to find in Butler's actions any actual ''removal'' of Perales from the job.[9]

I find it very hard in the circumstances to believe Perales when he insists that he begged Phillips to permit him to go to the union hall to get the alleged ''mistake'' squared away. What is reasonably clear is that, by all accounts, Perales was given exactly that chance—that Butler did not ''remove'' Perales from the site, but rather accommodated Perales' own request to leave work early to ''get things squared away with the Union.'' What is reasonably clear, moreover, is that Perales never had any intention to go to the Union to ''get things squared away,'' but, rather, departed the site only for the purpose of filing a charge with the Board. What is reasonably clear, finally, is that Perales had for years studiously avoided any personal confrontation with the Union's directorate; so far as the credited record shows, he had never, in the previous 3 years, spoken directly with any agent of the Union concerning his alleged prior overpayments or his entitlement to a credit therefor, or concerning his refusal after November 1987 to pay any more dues. Thus it defies probabilities to suppose that it was Perales who sought the opportunity to clear up the problem with the Union, only to be rebuffed by Phillips' demands for Perales' ''immediate removal'' from the jobsite, and further rebuffed by Butler's own supposed ''removal'' of Perales from the site.

I therefore find as fact that Phillips did not communicate either to Perales or to any agent of Wagner any ''request'' for Perales' ''immediate removal,'' as factually alleged in the complaint. Similarly—and contrary to factual pleadings in the complaint—I find as fact that Butler never ''removed'' Perales from the site. Rather, I find that Perales himself left the site voluntarily, and, with equal willfulness, failed to make any effort to return to the site or to deal directly with the Union over this dispute until counseled to do so by the Board's agent roughly 2 weeks later. In sum, I find that the Union had not progressed to the point of demanding Perales' removal at any time before Perales himself quit the scene.[10]

## Analysis and Conclusions of Law

It is settled under Section 8(b)(2) and (3) of the Act that a union may enforce a lawful union-security clause in a labor agreement by insisting that an employer discharge any employee who is obliged under that clause to pay dues and who fails to do so. But, hand-in-hand with that right is the union's ''fiduciary duty,'' before seeking an employees' discharge for dues-delinquency, to forewarn the delinquent employee of his or her obligations by giving, ''reasonable notice of this delinquency, including a statement of the precise amount and months for which dues were owed, as well as an explanation of the method used in computing such amount.''[11] One rationale for imposing such a duty is to help ensure that an employee, acting reasonably, will not fail to satisfy a dues obligation to a union out of mere ''ignorance'' or ''inadvertence,'' but only as a result of ''conscious choice.''[12] It is equally established, however, that, ''the Board never intended these notice requirements to be so rigidly applied as to permit a recalcitrant employee to profit from his own dereliction in complying with his obligations as a union

[9] In a page from Butler's ''Daily Report'' notebook (G.C. Exh. 11) offered by the General Counsel to ''corroborate'' Butler's testimony, Butler made this entry:

> Union official Phillips came to jobsite told to remove A. Perales did so.

When I received the exhibit for a limited purpose, only as ''being what it purports to be,'' I noted the absence of any objection by union counsel. I also questioned its admissible purpose, deeming it plainly hearsay and therefore not properly receivable for ''corroboration.'' On brief, the General Counsel now argues that the page from Butler's notebook ''is a record kept in the normal course of business and, thus, an exception to the hearsay rule.'' But the General Counsel never identified his moving purpose that way when he tendered the exhibit, nor did he lay a sufficient foundation that Butler maintained his notebook ''in the course of a regularly conducted business activity'' within the meaning of the hearsay exception contained in Rule 803(6), *Federal Rules of Evidence*. Technical evidentiary points aside, I observe that Butler's summary notes do not, in fact, ''corroborate'' Butler's more detailed accounts and admissions from the witness stand, in which he substantially conceded that he was neither presented with a union demand for Perales' immediate ''removal'' nor did he ''remove'' Perales from the job, but instead merely gave Perales permission to leave the job early in hopes that he would get ''squared away'' with the Union and obtain a clearance to return to work. Moreover, Butler admittedly kept somewhat inaccurate daily records in other respects, including records relating to when Perales first returned to work in December, what hours he worked, and on what jobs. In all the circumstances, I give no weight to Butler's summary notebook entry.

[10] Aleman and Phillips concede that, after Phillips' jobsite confrontation with Perales and his call to Wagner's agents, Phillips returned to the Union's office and was then instructed by Aleman to prepare a ''Violation Notice—Removal Slip'' of the type described earlier, against Wagner. And Phillips admittedly did complete such a form on December 15, routing it back to Aleman's desk for approval and issuance. There is no direct evidence, however, that the Union ever served that slip on Wagner, or, if so, when. Indeed, Butler, the only Wagner agent called by the General Counsel, was not asked whether he was aware of Wagner's ever having received such a slip. Accordingly, this evidence shows only that the Union was prepared to seek Perales' removal, consistent with what I have found that Phillips separately imparted to Perales and Butler on December 14. It does not show that the Union had actually presented Wagner with a ''request'' for Perales' ''immediate removal'' at any time before—or even after—Perales left the site.

[11] E.g., *Teamsters Local 13 (Mobile Pre-Mix Concrete)*, 268 NLRB 930, 931 (1982), and cases cited therein.

[12] *Boilermakers Lodge 723 (Triple A Machine Shop)*, 239 NLRB 504 (1978), citing *Conduction Corp.*, 183 NLRB 419, 426 (1970).

member[,]'' and, therefore, that such ''recalcitrance'' on the delinquent employees' part may ''excuse'' any ''infirmity'' in the union's ''formal notice'' to the delinquent.[13]

The Union defends against the complaint in part on the ground that its actions were ''excused'' by Perales' ''recalcitrance'' in consciously choosing not to pay dues for the 13 months before Phillips confronted him on December 14. While there is much in the record to support such a claim by the Union,[14] I do not find it necessary to reach that defense on its merits, for I have found that the Union did not, in fact, seek Perales' removal from Wagner's employ at any time before Perales' removed himself from the job. In the circumstances, the Union's duty under the cases to provide various forms of notice to Perales about the details of the Union's claim for back-owed dues had not yet been perfected when Perales left the job, and therefore I need not decide, in turn, whether Perales' alleged prior ''recalcitrance'' would have ''excused'' the Union's failure to give such prior notice if the Union had sought Perales' ''immediate removal'' from the job.

Rather, in essential agreement with the Union on this point, I find not only that the facts herein are ''keenly similar'' to those in *Carpenters Local 515 (G.E. Johnson Construction),*[15] but that the Board's holding in that case also substantially disposes of the General Counsel's central claims here. Insofar as the original complaint supposes that the Union requested Perales' immediate discharge, and that Wagner did in fact discharge Perales, it cannot be sustained by the facts as I have found them.

I could not find on this record, as proposed in one of the General Counsel's alternative theories, that the Union acted discriminatorily, or out of hostile motive, or ''arbitrarily,'' in approaching Perales on December 14 and demanding that he clear up his delinquency suspension as a condition of obtaining the Union's clearance to remain on the job. As found above, I am not persuaded that the Union was ever on notice before December 14, 1988, of any claim by Perales that he had overpaid dues between 1985 and 1987, or that he was entitled to a credit for such overpayment. I therefore do not find it remarkable, much less evidence that the Union was proceeding with discriminatory or hostile intent, that the Union would seek to confront Perales over his 13-month dues arrearage when it learned he had gone back to work for Wagner in mid-December 1988.[16]

Neither can I reach the merits of the General Counsel's final alternative theory of violation—that Perales' was a ''new'' employee, entitled to a full 7-day ''grace period,'' before the Union could lawfully demand his discharge. Apart from the evidentiary problems with the proposition that Perales returned to work for Wagner as a ''new'' employee,[17] this theory likewise supposes, contrary to findings above, that the Union took some action on December 14 to effect Perales' ''immediate removal'' from the job. Thus, it is ultimately a moot question whether the Union could lawfully have demanded Perales' immediate removal from the site under circumstances where he had arguably worked fewer than a full 7 days for Wagner as of December 14.

[13] *Big Rivers Electric Corp*., 260 NLRB 329 (1982), and cases cited.

[14] Seeking to avoid a finding that Perales was ''recalcitrant'' within the meaning of the cases referred to above, the General Counsel urges that ''Perales ceased paying dues solely because he *legitimately* [emphasis added] felt that he was due a credit for his overpayment of dues.'' I find no persuasive evidence that Perales ceased paying dues out of any reasonable (or ''legitimate'') belief that he had ''overpaid'' in the 24 months preceding November 1987 to such an extent that he was still ''current'' 13 months after he stopped paying *any* dues, at the point he was confronted by Phillips on December 14, 1988. Certainly, there is no evidence that either Perales (or the General Counsel) ever made any careful accounting of his alleged 1985–1987 ''overpayment'' and sought to compare it with his admitted ''underpayment'' (that is, no payments at all) from November 1987 through December 14, 1988. Indeed, even if Perales subjectively believed all along that he had previously ''overpaid'' for 2 years, it appears that he was never certain what the ''disability dues'' amount should have been at any given point, and thus never made any attempt at any accounting of where he stood with the Union as of December 1988, when he returned to work for Wagner. Neither am I persuaded by the General Counsel's implicit attempt to analogize Perales' conduct herein to that of employee Murphy in *Valley Cabinet & Mfg*., 253 NLRB 98 (1980), whose nonpayment of dues the administrative law judge found was ''not . . . clearly shown to have been due to anything other than inattention or negligence,'' as distinguished from a ''conscious choice'' on her part to ''avoid her obligations.'' 253 NLRB at 109. Here, there can be no doubt that Perales ''consciously chose'' to stop paying dues in November 1987, and did not do so merely because of ''inattention'' or ''negligence'' in the management of his affairs with the Union.

[15] 188 NLRB 832, 833 (1971), where the Board found,

> it is clear . . . that [union agent] Sweetser twice warned [employer agent] Langowski and once warned [delinquent employee] Huber that he would pull Huber off the job if he did not pay his dues, but always phrased such warnings prospectively, each time giving Huber another opportunity to pay his dues and avoid that eventuality. Sweetser further told Langowski that he had a letter prepared calling for Huber's discharge, but, significantly, did not deliver it. Langowski . . . neither expressly nor impliedly indicat[ed] [to Huber] that Huber was discharged. In these circumstances, we perceive nothing to support a conclusion that the Respondent directly or indirectly ever requested or demanded that the Company discharge Huber or that the Company did in fact discharge him. Assuming that such a demand by the Respondent was imminent, and that the Company would have acquiesced, Huber himself left the Company's employ before the Respondent had taken any action actually to request that the Company effect his termination.

In sum, we conclude that the General Counsel has not sustained his burden of establishing that any violation of Sec. 8(b)(2) or (1)(A) occurred.

[16] Moreover, the most that can be presumed from Perales' history of political opposition to the Union's current officers is that an atmosphere of rivalry and mutual distrust would have surrounded any interactions between Perales and the Aleman group in the (more than 4) years since Perales had been voted out of office. But there is no evidence that Perales interacted in any way with the Aleman group in that period, other than during his confrontation with Phillips on December 14, 1988. And there is no claim nor specific evidence that anyone in the current union directorate headed by Aleman had ever, prior to the disputed events of December 14, 1988, sought to interfere with Perales' employment as a laborer or had otherwise treated him differently from other rank-and-file members with respect to matters affecting his working in the trade. Indeed, when, as discussed above, Perales went to work briefly for Wagner in April 1987, the Union furnished Perales with a clearance for the job, notwithstanding that he had located his own job and had already started working when he appeared at the Union's office to obtain the clearance.

[17] Counsel for the General Counsel went to great lengths to show (for a different purpose—to rebut any claim that Perales should have obtained a new ''clearance'' before returning to Wagner in December 1988) that Perales had earlier left Wagner's employ under a ''layoff,'' that Perales' status as an employee of Wagner was already a matter of record with the pension and benefit trusts (thereby further undermining any need to obtain a new clearance), that he at all times enjoyed a reasonable expectancy to be recalled from that ''layoff'' as soon as he became fit, and that the Union did not generally require ''laid off'' employees to get a new clearance upon their being recalled by the same employer. It is therefore somewhat awkward for the General Counsel now to claim that Perales enjoyed ''new'' employee status with Wagner when he arrived on the job in December. In any case, although I invited briefing from the General Counsel on this point, he has not called my attention to any case which suggests that a construction employee's union-security obligations in a multiemployer bargaining unit allow him a new 7-day ''grace period'' with each new employer he may find work with. Accordingly, if Perales was already delinquent in his dues-obligations when he found work with Wagner, it was seemingly no defense to the Union's right to seek his removal (subject to its previously acknowledged duty to give appropriate ''notice'' of the delinquency amount, etc.) that Perales might properly be treated as a ''new'' employee of Wagner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The complaint is dismissed.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.